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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VALENTIN ARIAS JIMENEZ, Defendant and Appellant.	A153706 (San Mateo County Super. Ct. No. 17SF014474A)

Defendant Valentin Arias Jimenez was convicted of crimes in San Francisco County and in San Mateo County. While on mandatory supervision, appellant committed a crime in San Mateo. The San Mateo County trial court resentenced defendant in the San Francisco case and consolidated the sentences for an aggregate term. Appellant's sole contention is that the San Mateo County trial court erred when it refused to award additional credits for his time in custody and time on supervision in the San Francisco case. We affirm.

I. BACKGROUND

On November 29, 2017, the San Mateo County District Attorney filed a felony complaint charging appellant with two felony counts of vehicle taking (Veh. Code, § 10851) and receiving a stolen motor vehicle (Pen. Code,[1] § 496(d)); and one

[1] All further undesignated statutory references are to the Penal Code.

misdemeanor count each of methamphetamine possession (Health & Saf. Code, § 11377) and driving on a highway without a valid license (Veh. Code, § 12500). With respect to the felony counts, the complaint additionally alleged that appellant had suffered a prior conviction for vehicle taking (§ 666.5).

On February 7, 2018, appellant pleaded no contest to one of the vehicle taking charges and admitted the prior vehicle taking conviction, and the prosecutor dismissed the balance of the complaint. The written plea agreement, signed and initialed by appellant, reflects that he was to receive a "4 yrs 1170(h) sentence split 2 yrs in 2 yrs out w/ CTS 49+ 48 & resentence SF #227079 to 8 mos consecutive *with credits of 8 mos*."

At the hearing, the trial court initially sentenced appellant for the vehicle taking conviction, i.e., to "four years in the county jail, . . . the initial two years in the county jail, remaining two years of that sentence . . . suspended" while appellant would be "on mandatory supervision supervised by the probation department." The trial court asked if appellant had any credits toward satisfying that sentence, and the prosecutor responded that per the plea agreement that appellant had "49 plus 48" for a total of 97 days. Defense counsel, however, stated that appellant was "entitled at a minimum to credits of 49 plus 48" and that counsel would "be arguing that [appellant] should be getting considerably greater credits."

The trial court thereafter recalled the sentence to "add the San Francisco case number 227079." The court sentenced appellant "to one-third the midterm" for the San Francisco conviction, which was "eight months in the county jail," to be served "consecutive to the sentence" for the vehicle taking. Defense counsel explained that appellant had already "served sixteen months of a sixteen-month sentence" on the San Francisco conviction, "which means he served eight months actual time." Counsel further stated that appellant had accrued 231 days of additional custody credits for his

"mandatory supervision time[] from April 14th, of 2017, through November 30th, of 2017."[2]

Defense counsel argued that because the sentence for the San Francisco case was now aggregated with the vehicle taking sentence, appellant was entitled to "eight months of actual custodial time plus an additional eight months of [conduct] credits, plus" the 231 days under mandatory supervision.

In response, the prosecutor noted that a different judge at a previous hearing had "deemed [that appellant] was not to receive those additional credits and took that into consideration in making the offer in this case." "Defense counsel was aware of [the credits ruling] at the time the court made [its] offer," the prosecutor continued, "and therefore, [appellant] is accepting this plea bargain with that understanding.

The trial court then imposed the aggregate sentence, adopting the prosecutor's position on credits and awarding appellant "four months actual, plus four months good time, for a total of eight months credit for time served." When the court stated that it would be imposing all of the original terms and conditions on the San Francisco case, defense counsel noted appellant was no longer on mandatory supervision in San Francisco, adding that there would not be "any terms and conditions left." Addressing defense counsel, the court stated, "You are correct. So the sentence is deemed finished." Defense counsel thanked the court for acknowledging this procedural posture.

II. DISCUSSION

Appellant argues that since his San Francisco case was aggregated with his San Mateo case, he should have received an additional eight months of credit for the time he spent in custody in San Francisco, plus an additional 231 days of credits for time on mandatory supervision in San Francisco. According to appellant, if he is not allowed to

[2] The details of the San Francisco case are not included in the record. In the notice of appeal, however, defense counsel provides the procedural history of the San Francisco case.

use these additional credits in the San Mateo case, the time he spent in custody and on supervision in the San Francisco case would result in "dead time."

The Attorney General argues that appellant's contentions fail at the outset because he provides no competent evidence, either below or on appeal, of the credits he accrued in jail or on mandatory supervision in San Francisco. The Attorney General maintains that even if appellant could substantiate his claims, he waived any claim to additional credits by accepting the plea deal, and he further forfeited the argument by failing to obtain a certificate of probable cause.

Assuming without deciding that the issues have been preserved on appeal, they fail on the merits.

As noted, appellant was convicted of two felony crimes, the first in San Francisco and the second in San Mateo. As required by California Rules of Court, rule 4.452, the San Mateo court pronounced a single aggregate term that combined the previous and current sentences. The aggregate term imposed was the sum of the principle term (San Mateo case) and the subordinate term (San Francisco case). (§ 1170.1, subd. (a).)

It is well established that custody credits are case specific—they accrue only in the case where they are earned. (§ 2900.5(b); *In re Joyner* (1989) 48 Cal.3d 487.) Here, appellant argues he is entitled to additional credits because the credits he earned in the San Francisco case exceed the eight-month sentence ordered after imposition of the new aggregate term in the San Mateo case. Contrary to appellant's assertion, the excess credits are not transferrable to the San Mateo case because they were not earned in *that case*.

Section 2900.5 specifies in subdivision (b) that custody "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (See also *People v. Lathrop* (1993) 13 Cal.App.4th 1401, 1403.) "The crucial element of the statute is not where or under what conditions the defendant has been deprived of his liberty but rather whether the custody to which he has been subjected 'is

attributable to charges arising from the same criminal act or acts for which the defendant has been convicted.' (§ 2900.5, subd. (b).)" (*In re Watson* (1977) 19 Cal.3d 646, 651; see also *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 203.) "Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*In re Rojas* (1979) 23 Cal.3d 152, 156; *People v. Wiley* (1994) 25 Cal.App.4th 159, 165.)

In other words, "[s]ection 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Thus, if a period of custody "stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Id.*, at pp. 1193-1194.) And where, as here, multiple proceedings lead to terms imposed by the last sentencing court, the "attributable" limitation still governs. Credits are not reallocated; they remain strictly assigned to the proceedings in which they were earned. (*People v. Lacebal* (1991) 233 Cal.App.3d 1061, 1066 (*Lacebal*); *People v. Adrian* (1987) 191 Cal.App.3d 868, 877 (*Adrian*).) "'Therefore, if the last court orders consecutive sentences and the credits earned on the terms ordered to run consecutive exceed the resulting one-third of middle base terms imposed, the consecutive terms are "served," but the excess credits are not available to reduce the unrelated full base term. [Citations.]' [Citation.]" (*Lacebal*, at p. 1066.)

Here, the credits awarded towards the San Francisco case were based on periods of custody and supervision that took place *before* appellant committed the offense in the San Mateo case, and as such, those credits were not attributable in any way to the San Francisco case. To the extent appellant's credits earned in the San Francisco case exceed the consecutive sentence imposed in the San Mateo case, his San Francisco sentenced was deemed "served." Under these circumstances, reallocating the San Francisco credits to the San Mateo case would fall squarely within the prohibition against duplicate credits set forth in section 2900.5, subdivision (b).)

It is well established that where, as here, the credit on a subordinate consecutive term exceeds one-third the midterm imposed, excess credit may not be used to reduce the unrelated principal term. (*Lacebal, supra,* 233 Cal.App.3d at p. 1066; *Adrian, supra,* 191 Cal.App.3d at p. 877; *People v. Brown* (1984) 156 Cal.App.3d 1131, 1134-1135 (*Brown*).) The *Lacebal-Adrian-Brown* line of cases has interpreted section 2900.5 to preclude appellant's view that he is entitled to a reallocation of credits to avoid so-called "dead time." (*Lacebal,* at pp. 1064-1066; *Adrian,* at pp. 876-877 ["credits are not reallocated: they remain assigned only to the proceedings in which they were earned"]; *Brown,* at pp. 1134-1136.)

Appellant argues that we should not follow the *Lacebal-Adrian-Brown* line of cases because newer authority provides that reallocation is the "better course" to follow. He cites to *People v. Gonzalez* (2006) 138 Cal.App.4th 246 (*Gonzalez*), *People v. Torres* (2012) 212 Cal.App.4th 440 (*Torres*), and *People v. Phoenix* (2014) 231 Cal.App.4th 1119 (*Phoenix*), in support of his position.

The *Gonzalez-Torres-Phoenix* line of cases is readily distinguishable because in each of those cases the excess credits were accrued during custodial periods attributable to *both* the satisfied subordinate term and the base term. (*Gonzalez, supra,* 138 Cal.App.4th at p. 252 ["defendant's custody can be attributed to 'multiple, unrelated causes.' His time in custody for the second period of time was attributable to *both* the domestic violence case and the auto theft and gun case"]; *Torres, supra,* 212 Cal.App.4th at p. 447 [because "the period of Torres's custody between his sentencing in Sonoma and his rentencing in Mendocino" were "attributable to both the Sonoma County case and the Mendocino County cases," the excess credits remaining after "the modified Sonoma County sentence was fulfilled . . . was and should have been characterized as solely attributable to the controlling Mendocino case and allocated accordingly" (internal quotation marks omitted)]; *Phoenix, supra,* 231 Cal.App.4th at pp. 1127-1129 [because "there [was] overlapping time served" for Yolo County and Sacramento County offenses, credits remaining "after [defendant's] time was served on the 16-month sentence on the

Sacramento case . . . was thereafter solely attributable to the Yolo County case" (internal quotation marks omitted)].)

Here, in contrast, the credits that appellant seeks to apply to the four-year base term in the San Mateo case were accrued during custody solely attributable to the San Francisco conviction. With the possible exception of his last few days of mandatory supervision, appellant "was not in custody" on the vehicle-taking because "he had not yet committed it." (*Brown, supra,* 156 Cal.App.3d at p. 1135.) Thus, even if appellant could support his calculation for the credits accrued in the San Francisco case, he would at most have been held in overlapping custody from approximately November 28 to 30.[3]

Contrary to appellant's contention, the "unique nature" of split sentencing under section 1170, subdivision (h) does not compel a contrary conclusion. Section 1170, subdivision (h) is part of the Realignment Act, enacted in 2011, which allows certain low-level felony offenders to be sentenced to county jail, followed by a period of mandatory supervision. (See § 17.5; Stats. 2011, ch. 39, § 5.) "The mechanics of imposing a concurrent and consecutive sentence under section 1170(h)(5) [is] substantially the same as traditional state prison sentences under sections 1170 and 1170.1. Under the realignment legislation, the structure of sentences under section 1170(h)(5) is exactly the same as it has been for years for state prison commitments—only the place where the sentence is served has changed. Once the aggregate term has been determined after taking into account concurrent or consecutive sentencing, the court must then determine how much of the aggregate term, if any, will be served on mandatory supervision. (Couzens & Bigelow, Felony Sentencing After Realignment (May 2017), p.20,
at <http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf>.) The San

[3] As noted, the record fails to substantiate appellant's credits earned in the San Francisco. The record also fails to indicate when appellant was taken into custody in the San Mateo case.

Mateo trial court fully complied with the requirements of section 1170, subdivision (h)(5).

Finally, we are not persuaded by appellant's passing suggestion that the only way to avoid constitutional problems is to apply his excess San Francisco credits to his San Mateo case. The doctrine of constitutional avoidance invoked by appellant, however, does not apply unless "the statute [is] *realistically* susceptible of two interpretations and the interpretation to be rejected . . . raise[s] *grave and doubtful* constitutional questions." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146, superseded by statute on other grounds as recognized in *People v. Mil* (2012) 53 Cal.4th 400, 408.) Here, section 2900.5 and 1170.1 are realistically susceptible of only one interpretation: appellant's credits from custody *solely* attributable to his San Francisco conviction can only be used to satisfy the sentence term for that conviction. The constitutional avoidance doctrine therefore does not apply.

For all of these reasons, we reject appellant's claim that the trial court erred in failing to reallocate the excess credits from the San Francisco case to the San Mateo case.

III. DISPOSITION

The judgment is affirmed.

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Reardon, J.*

We concur:

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Streeter, Acting P.J.

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* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Tucher, J.